RECEIVED
OCT 22 1979
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1979

NO. 79-5532

HAROLD STRUBE,
Appellant

vs.

DALE SUMNER,
Appellee

ON APPEAL FROM THE SUPREME COURT
OF INDIANA

JURISDICTIONAL STATEMENT

John Blumenthal
Jonathan E. Butterfield
Donald Driscoll

Susquehanna Legal Services
416 Pine Street
Williamsport, PA 17701
(717) 323-8741

Bruce Hugon
Legal Services Organization
of Indiana
107 North Pennsylvania St., #300
Indianapolis, IN

ATTORNEYS FOR APPELLANT

October 22, 1979

INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	4
Raising the federal question	6
Statement of the case	6
The question is substantial	9
Conclusion	21
Appendix	A1

CITATIONS

Cases:	Page
Bullock v. Carter, 405 U.S. 134 (1972)	12
Califano v. Goldfarb, 430 U.S. 199 (1977)	11
Caulk v. Nichols, 281 A.2d 24 (Del., 1971), App. Dis., 408 U.S. 901 (1971)	20,21
Chambers v. Baltimore Ohio R. Co., 207 U.S. 142 (1908)	12
Craig v. Boren, 429 U.S. 190 (1976)	11
Frontiero v. Richardson, 411 U.S. 677 (1973)	11
Griffin v. Illinois, 351 U.S. 12 (1956)	14,15
Griffiths, In Re, 413 U.S. 717 (1973)	2
Hayes Freight Lines, Inc. v. Oestericher, 117 In. App. 143, 68 N.E.2d 792 (1946)	19,20
Huey v. Milligan, 242 Ind. 93, 175 N.E.2d 698, 700 (1961)	18
Jiminez v. Weinberger, 417 U.S. 628 (1974)	11
Lathrop v. Donohue, 367 U.S. 780 (1961)	2,3
Lindsey v. Normet, 405 U.S. 56 (1972)	10,15,16,17
Loving v. Virginia, 388 U.S. 1 (1967)	10
Marcus v. Search Warrants, 367 U.S. 717 (1961)	2
Mayer v. City of Chicago, 404 U.S. 189 (1971)	2
Ortwein v. Schwab, 410 U.S. 656 (1973)	15,16
Reed v. Reed, 404 U.S. 71 (1971)	11
Rinaldi v. Yeager, 384 U.S. 305 (1966)	15,16,17,19
Shapiro v. Thompson, 394 U.S. 618 (1969)	10
Strube v. Sumner, 385 N.E.2d 948 (Ind. App., 1978)	6,13,14,16,19
Trimble v. Gordon, 430 U.S. 762 (1977)	11,13
Weber v. Aetna Casualty and Surety Co., 406 U.S. 164 (1972)	10,11,13

Constitutional Provisions: Page

United States Constitution, Fourteenth Amendment, Section I . . . . . Passim

Statutes:

United States Code, Title 28 §1257(2) 2

Indiana Code

IC 23-2-1-19 14
IC 33-4-4-3 16
IC 33-5-35-6 16
IC 33-6-1-2 16
IC 33-10.5-1-1 9
IC 33-10.5-7-10 9
IC 33-11.6-4-2 7
IC 33-11.6-4-3 8
IC 33-11.6-4-5 3
IC 33-11.6-4-8 8
IC 33-11.6-4-9 8
IC 33-11.6-4-14 8

Rules:

Indiana Rule of Appellate Procedure 6(B) 8,16

Marion County Small Claims Rules 16(B) . . . . . Passim

Articles:

A First Amendment Right of Access to the Courts for Indigents, 82 Yale L.J. 1055 (1973) 12

Karst, The Supreme Court 1976 Term, Foreword: Equal Citizenship Under the Fourteenth Amendment, 91 Harvard L.R. 1 (1977) 11

Michelman, The Supreme Court and Litigation Access Fees: The Right to Protect One's Rights, Part I, 1973 Duke L.J. 1153 Part II, 1974 Duke L.J. 527 12

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1979

NO._____

HAROLD STRUBE,
Appellant

vs.

DALE SUMNER,
Appellee

ON APPEAL FROM THE SUPREME COURT
OF INDIANA

JURISDICTIONAL STATEMENT

Harold Strube, the appellant, appeals from the final judgment of the Supreme Court of Indiana, dated July 23, 1979, denying his petition for transfer from the Indiana Court of Appeals. The Court of Appeals issued an opinion dated December 20, 1978 holding that Rule 16(B) of the Marion County, Indiana, Small Claims Court Rules, as applied in this case, did not violate appellant's right to the equal protection of the law as guaranteed by the Fourteenth Amendment to the United States Constitution.

OPINIONS BELOW

The order of the Indiana Supreme Court denying transfer is unreported. The opinion of the Indiana Court of Appeals, which appears in the appendix hereto, is reported at 385 N.E.2d 948 (Ind. App., 1978).

JURISDICTION

The judgment of the Indiana Supreme Court, denying transfer from the Indiana Court of Appeals, was entered on July 23, 1979. The opinion of the Indiana Court of Appeals sustaining the validity of the Marion County Small Claims Court appeal bond rule was rendered on December 20, 1978. Appellant's petition for rehearing was denied by the Indiana Court of Appeals on April 17, 1979.

A notice of appeal to this Court was filed in the Supreme Court of Indiana within 90 days of the date of the Indiana Supreme Court's ruling on the petition for transfer.

This appeal is being docketed in this Court within 90 days of the denial of transfer below. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(2) which grants this Court authority to review, on appeal, a judgment of a state court "where [there] is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution. . .cf the United States, and the decision is in favor of its validity." Here the appellant mounts a constitutional challenge to a rule of court; however, prior decisions of this Court reveal that rules of court should be considered "statutes" for purposes of 28 U.S.C. §1257(2). Marcus v. Search Warrants, 367 U.S. 717 (1961) (state court rule supplementing statutory procedures for seizure of personal property); In Re Griffiths, 413 U.S. 717 (1973), (state court rule prohibiting aliens from taking bar exam); Mayer v. City of Chicago, 404 U.S. 189 (1971), (state court rule interpreted as denying free transcripts to indigents); cf. Lathrop v. Donohue, 367 U.S. 780 (1961), (Wisconsin Supreme Court order integrating the Wisconsin Bar). In Lathrop, the Court held that the controlling factor in these circumstances is not the source of the enactment, but whether the enactment was legislative in nature:

> Under [§1257(2)], the legislative character of challenged state action, rather than the nature of the agency of the State performing the act, is decisive of the question of jurisdiction. It is not necessary that the state legislature itself should have taken the action drawn in question. In construing the similar jurisdictional provision in the Judiciary Act of 1867, 14 Stat. 385, we said: "Any enactment, from whatever source originating, to which a State gives the force of law is a statute of the State, within the meaning of the clause cited relating to the jurisdiction of this court." Williams v. Bruffy, 96 U.S. 176, 183, 24 L.Ed. 716. We likewise said of the provision of the Act of 1925, 43 Stat. 936, which is the present §1257(2) "* * *the jurisdictional provision uses the words 'a statute of any state' in their larger sense and is not intended to make a distinction between acts of a state legislature and other exertions of the State's law-making power, but rather to include every act legislative in character to which the state gives its sanction." King Manufacturing Co. v. City Council, 277 U.S. 100, 104-105, 48 S.Ct. 489, 490, 72 L.Ed. 801.

Lathrop v. Donohue, 367 U.S. at 824. This Court was satisfied that the state court's order was indeed legislative in nature because it had been "effected through an interplay of action by the legislature and the court. . . ." Id. at 825. The rule challenged in the present case was promulgated by the Marion County Circuit Court pursuant to the statutory mandate of the Indiana legislature. IC 33-11.6-4-5:

> The judge of the circuit court, assisted by the judges of the Small Claims Court, shall make and adopt uniform rules for conducting the business of the Small Claims Court and for appeals therefrom. . . . (Emphasis added).

It is of no consequence that the enactment in question is not one of statewide application. This Court has upheld its jurisdiction on appeal of challenges to municipal ordinances. King Manufacturing Co. v. City Council, supra.

The Supreme Court has jurisdiction on appeal to review the judgment of the lower court in this case. However, should the Court hold otherwise, appellant respectfully requests that this application for review be treated as a petition for certiorari pursuant to 28 U.S.C. §2103.

QUESTIONS PRESENTED

1. Whether classifications affecting the administration of justice should be subject to a more exacting level of Equal Protection scrutiny than mere rationality.
2. Whether Rule 16(B) of the Marion Small Claims Court Rules, Marion County, Indiana, violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution in requiring defendant-appellants from the Marion County, Indiana, Small Claims Court to post an appeal bond as a jurisdictional prerequisite to appeal when appellants from all other courts in the state, including those from the Marion County civil trial courts, are exempt from such a requirement and where plaintiffs in Marion County can impose this disadvantage on defendants by their selection of a forum.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

Section I, Fourteenth Amendment, United States Constitution:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

IC 33-11.6-4-5:

> Adoption of Rules. The judge of the circuit court, assisted by the judges of the small claims courts, shall make and adopt uniform rules for conducting the business of the small claims court and for appeals therefrom according to a simplified procedure and in the spirit of sections 6 and 8 of this chapter.

IC 33-11.6-4-14:

> Appeals. All appeals from judgments of the small claims court shall be taken to the circuit or superior courts of the county and tried de novo. All appeals from proceedings under IC 1971, 33-11.6-6 shall be taken to a criminal court of the county and tried de novo. Rules of procedure for appeals shall be in accordance with the rules established by the circuit court.

IC 33-11.6-4-14 (amended effective January 1, 1979):

> All appeals from judgments of the small claims court shall be taken to the circuit or superior court of the county and tried de novo. Rules of procedure for appeals shall be in accordance with the rules established by the circuit court.

Rule 6(B), Indiana Rules of Appellate Procedure:

> No appeal bond shall be necessary to perfect an appeal from any judgment or appealable interlocutory order. Enforcement of a judgment or appealable interlocutory order, however, will be suspended during appeal upon the giving of an adequate bond with approved sureties. The trial court or judge thereof shall have jurisdiction to fix and approve the bond and order a stay pending an appeal as well as prior to the appeal. If the stay is denied by the trial court or judge thereof, the appellate tribunal may reconsider the application at any time after denial upon a proper showing by certified copies of the trial court's action and grant or deny the same and fix the bond. Provided, however, no bond shall be required from a governmental organization as provided in Trial Rule 62(E). Nothing herein shall be construed as giving a right to stay, by giving such bond, any judgment or order which cannot now be stayed and suspended by the giving of an appeal bond.

Rule 16(B), Marion Small Claims Court Rules, Marion County, Indiana:

> The appellant shall, except in cases where the same is dispensed with by law, file with the court a bond, with security to be approved by the judge, payable to the appellee, in a sum sufficient to secure the claim of the appellee and interests and costs, conditioned that he will prosecute his appeal to effect, and pay the judgment that may be rendered against him in the circuit court.

RAISING THE FEDERAL QUESTION

The Equal Protection challenge to the appeal bond rule was first raised in oral argument, in the Marion County, Indiana, Superior Court, on appellee's motion to vacate the order granting leave to proceed without posting an appeal bond. The Equal Protection question was raised again in appellant's post-trial motion to correct errors and memorandum in support thereof, in his brief to the Indiana Court of Appeals, in his brief in support of his petition for rehearing, and again in his brief in support of his petition for transfer to the Indiana Supreme Court.

The only written opinion issued during the course of these proceedings was that of the Indiana Court of Appeals. The Court of Appeals held: "We must also reject Strube's equal protection argument that Rule 16(B) is constitutionally invalid since it discriminates between Marion County Small Claims appellants and all other appellants in the State (Footnote omitted)." Strube v. Sumner, 385 N.E.2d 948, 950 (Ind. App., 1978). Thus, Strube's Equal Protection argument was considered and expressly rejected.

STATEMENT OF THE CASE

This action was initiated on December 13, 1976, in the Marion County Small Claims Court, Washington Division, by Dale Sumner against Harold Strube to recover $1,150.00 in

damages plus costs and interest arising from an automobile accident between the parties on April 30, 1976. A trial was held on March 21, 1977, and judgment in the amount of $1,179.04 plus costs was rendered for plaintiff Sumner on March 22, 1977.

On March 29, 1977, defendant Strube moved the Superior Court of Marion County for leave to appeal without the payment of a filing fee or the posting of an appeal bond. Strube's verified motion revealed that his sole source of income was $40.00 per week in unemployment compensation and that his wife and five month old child were totally dependent upon him for support. The motion was granted on March 29, 1977, by the Honorable Michael Dugan, Judge of the Marion County Superior Court.

On April 22, 1977, Strube filed his notice of appeal and praecipe in the Small Claims Court. Plaintiff Sumner filed a motion in the Marion County Superior Court to vacate that part of the Court's order waiving the appeal bond. On May 16, 1977, Judge Dugan vacated that portion of his order of March 29 which permitted Strube to appeal without posting an appeal bond; however, that portion of the previous order allowing Strube to appeal without payment of a filing fee remained undisturbed.

On May 16, 1977, the Small Claims Court set an appeal bond in the amount of $1215.04.

On June 9, 1977, plaintiff Sumner moved to dismiss the appeal, and the appeal was dismissed on June 13, 1977.

The court in which this action originated, the Marion County Small Claims Court, Washington Division, is part of a system of small claims courts which is unique in Indiana. The jurisdiction of these small claims courts is limited to actions in contract or tort where the damage or debt claimed does not exceed $1500.00, IC 33-11.6-4-2, and to possessory actions where the amount of past due rent does not exceed

$1500.00, IC 33-11.6-4-3. No juries are provided for in small claims courts, IC 33-11.6-4-9. The courts are not bound by statutory provisions or rules of practice, procedure, pleadings, or evidence, IC 33-11.6-4-8.

IC 33-11.6-4-14 provides for appeals from the judgments rendered by the Marion Small Claims Court:

> All appeals from judgments of the small claims court shall be taken to the circuit or superior court of the county and tried de novo. All appeals from proceedings under IC 1971, 33-11.6-6 shall be taken to a criminal court of the county and tried de novo. Rules of procedure for appeals shall be in accordance with the rules established by the circuit court.[1]

Pursuant to the powers conferred on it by the foregoing statute, the Marion County Circuit Court promulgated Marion County Small Claims Rule 16(B), which states:

> The appellant shall, except in cases where the same is dispensed with by law, file with the court a bond, with security to be approved by the judge, payable to the appellee, in a sum sufficient to secure the claim of the appellee and interests and costs, conditioned that he will prosecute his appeal to effect, and pay the judgment that may be rendered against him in the circuit court.

In contrast, Rule 6(B), Indiana Rules of Appellate Procedure states the bond requirement for other Indiana litigants:

> No appeal bond shall be necessary to perfect an appeal from any judgment or appealable interlocutory order. Enforcement of a judgment or appealable interlocutory order, however, will be suspended during appeal upon the giving of an adequate bond with approved sureties.

This rule, dispensing with any bond requirement on appeal, except where a supersedeas is sought, is applicable not only to all trial courts in Indiana, but also to the jurisdictional counterpart of the Marion County Small Claims Court in other counties in Indiana, the county courts or small claims dockets of Superior Courts,[2] by virtue of IC 33-10.5-7-10:

> An appeal of a judgment from the county court shall be taken in the same manner and under the same rules and statutes and with the same assessment of costs as cases appealed from circuit court.

Contending that the disparate treatment on appeal accorded him and other Marion County Small Claims Court defendant-appellants, as compared with other Indiana litigants, denied him the equal protection of the laws guaranteed by the state and federal constitutions, Strube filed a motion to correct errors, pursuant to Indiana Trial Rule 59, with the Superior Court, seeking reinstatement of his appeal on July 28, 1977. His motion was denied on July 29, 1977. Strube filed a praecipe for appeal on August 24, 1977. On December 20, 1978, the Indiana Court of Appeals ruled against the defendant. On July 23, 1979, the Indiana Supreme Court denied Strube's Petition for Transfer, thereby affirming the judgment of the Indiana Court of Appeals.

THE QUESTION IS SUBSTANTIAL

A

CLASSIFICATIONS AFFECTING THE ADMINISTRATION OF JUSTICE SHOULD BE SUBJECT TO A MORE EXACTING LEVEL OF EQUAL PROTECTION SCRUTINY THAN MERE RATIONALITY

The promulgation of the appeal bond Rule governing appeals from the Marion Small Claims Court to the Marion County

---

[1] This statute was amended as of January 1, 1979, by deletion of the second sentence. The deleted sentence was not relevant to the issues in this case.

[2] County Courts and Small Claims dockets in Superior Courts in Indiana counties other than Marion are created by the County Court Act, IC 33-10.5-1-1 et seq.

Circuit and Superior Courts has arbitrarily isolated the Marion Small Claims appellant from the mainstream of appellate procedure in Indiana as well as from that of Marion County itself. The de facto classification implicitly created by the appeal bond Rule consists of all Marion Small Claims Court litigants vis a vis litigants in all other courts of the State of Indiana, including the trial courts of Marion County.

Strube contends that the classifications in this case, as well as the governmental purposes advanced to justify them, must be measured against a more stringent standard than mere rationality and that plaintiff-appellee should accordingly be required to demonstrate that the classifications are substantially related to these underlying justifications, particularly where, as here, the choice of a forum is in the hands of the plaintiff.

Where a governmentally created classification is neither suspect nor operates to affect a fundamental right, the rule of law will withstand constitutional review so long as the state can show that it bears a rational relationship to a legitimate governmental purpose. Lindsey v. Normet, 405 U.S. 56 (1972); Weber v. Aetna Casualty & Surety Co., 406 U.S. 164. (1972). Where government action has created a suspect classification or where an individual has a fundamental right at stake, this Court has held that the state must show that the legislative enactment in question is necessary to vindicate a compelling state interest. Loving v. Virginia, 388 U.S. 1 (1967), (race as a suspect classification); Shapiro v. Thompson, 394 U.S. 618 (1969), (interstate travel as a fundamental right).

In recent years, this Court has expanded its traditional equal protection analysis by identifying a number of areas in which a level of scrutiny more exacting than mere rationality but less demanding than suspectness is appropriate. Such

scrutiny has been applied to cases involving illegitimacy, such as Jiminez v. Weinberger, 417 U.S. 628 (1974), Weber v. Aetna Casualty and Surety Co., supra, and Trimble v. Gordon, 430 U.S. 762 (1977); as well as to cases involving sex discrimination such as Reed v. Reed, 404 U.S. 71 (1971); Frontiero v. Richardson, 411 U.S. 677 (1973); Craig v. Boren, 429 U.S. 190 (1976); and Califano v. Goldfarb, 430 U.S. 199 (1977). In these cases, the Court closely examined the relationship between the discriminatory classifications and the purposes advanced to justify them and found either no evidence that the classification furthered the end or that the means did not substantially further the ends the legislature purportedly had in mind. In Craig v. Boren, supra, the Court specifically held that in order "[t]o withstand constitutional challenge, . . . classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives." 429 U.S. at 197. On these and other occasions, the pronouncements of this Court "have made clear that the degree of suspectness of a classification is chiefly determined by the degree to which the classification interferes with the interest in being treated as a person who belongs to the society as a respected, responsible and participating member." Kenneth L. Karst, The Supreme Court 1976 Term, Foreword: Equal Citizenship Under the Fourteenth Amendment, 91 Harvard L.R. 1, 26 (1977).

Classifications impairing an individual's ability to redress a wrong or to raise a defense in the judicial system are deserving of at least the same intensified level of scrutiny accorded to the victims of discrimination in the aforementioned categories of cases:

> The right to sue and defend in the Courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government. It is one of the highest

> and most essential privileges of citizenship. . . .

Chambers v. Baltimore and Ohio R. Co., 207 U.S. 142, 148 (1908), dicta. Commentators have elaborated on the essential role that equal and open access to the courts plays in giving life to the concept of citizenship in our participatory form of government, see Michelman, The Supreme Court and Litigation Access Fees: The Right to Protect One's Rights, Part I, 1973 Duke L.J. 1153, and Part II, 1974 Duke L.J. 527, and have concluded that barriers to access may not only result in "considerable individual hardship (footnote omitted), but diminished respect for the law as well." A First Amendment Right of Access to the Courts for Indigents, 82 Yale L.J. 1055, 1066 (1973).

Wealth is yet another factor which has been considered by the Court in determining the level of equal protection scrutiny to be applied to a particular case. In Bullock v. Carter, 405 U.S. 134 (1972), where the validity of a state primary election filing fee was at issue, the Court observed that while "not every limitation or incidental burden on the exercise of voting rights is subject to a stringent standard of review," 405 U.S. at 143, because the filing fee in question had a significant impact on the right to vote and because that impact was "related to the resources of the voters supporting a particular candidate," the filing fee requirement would be "closely scrutinized." Id at 144. As in Bullock, the present case presents the obvious likelihood that the hardship created by the appeal bond Rule will fall more heavily on the less affluent segment of the community. Id. Accordingly, the Court should consider that likelihood in fashioning the standard by which the classification in the instant case must be judged.

However, despite Strube's argument to the lower courts that they should take into account the nature of challenged rule, i.e. that it governs the administration of justice, and that they should therefore apply a more stringent standard of review to the discriminatory classifications affecting him, the Indiana Court of Appeals decided the case on the simple ground "that rules or statutes of limited geographical applicability are not automatically constitutionally void under the equal protection clauses merely because they are 'different'". Strube v. Sumner, 385 N.E.2d 948, 951 (Ind. App., 1978).

The sensitive nature of the right at stake together with the severe impact of the challenged rule on those unable to afford the price of justice distinguish the facts of the present case from other conceivable challenges to less important aspects of the Marion Small Claims Court system, and this combination of circumstances invites a more exacting equal protection analysis of the classifications created by the rule.

> ". . .[W]hen state statutory classifications approach sensitive and fundamental rights, [the United States Supreme Court] exercises a stricter scrutiny. . . .

Weber v. Aetna Casualty & Surety Co., supra, at 172, quoted in Trimble v. Gordon, 97 S.Ct. at 1463. This case does not involve a challenge to some minor rule of procedure which governs practice in the Marion Small Claims Court. The rule to which appellant takes exception is of great moment to his "life" or "death" as a litigant since the appeal bond requirement has effectively and finally terminated his pursuit of justice in this case. Accordingly, Strube's argument has virtually no implications for other rules or statutes of non-uniform application, unless they touch on "sensitive and fundamental rights." Certainly, classifications which affect the

administration of justice should be among those which trigger a higher level of scrutiny than the minimum "rational relationship to a legitimate state interest."

B

ONCE AN APPEAL HAS BEEN GRANTED BY STATUTE IT MAY NOT BE ARBITRARILY ABRIDGED BY THE IMPOSITION OF DISCRIMINATORY CLASSIFICATIONS

Appellant Strube contends that Marion County Small Claims Rule 16(B) creates two classifications of persons: defendant-appellants in the Marion County Small Claims Courts, who are required to post a bond in order to appeal, as opposed to almost all[3] other litigants in the State of Indiana, who need not post a bond in order to appeal. Appellant contends that this Rule cannot survive a heightened degree of scrutiny under the Equal Protection clause of the Fourteenth Amendment to the United States Constitution, in that the classification created by the rule does not substantially further an important governmental interest. Moreover, appellant contends that even if the Court rejects his argument for a heightened degree of scrutiny in this case, the Rule still cannot be sustained under even the most minimal level of scrutiny, in that the classification created by the rule is not rationally related to a legitimate state interest.

It is entirely clear from the Supreme Court's decisions that states have no constitutional obligation to provide appeals, but that once appeals are granted by the state, they cannot be arbitrarily denied to some litigants. Griffin v.

[3]In its opinion in the instant case, the Indiana Court of Appeals points out that Indiana statutes provide for an appeal bond in the amount of $500 for one other class of litigants -- persons seeking judicial review of an administrative decision denying an application for registration of an issue of securities. IC 23-2-1-19. The Court of Appeals did not suggest that the presence of another exception to the general rule derogates from appellant Strube's claim that his appeal rights are different from those of the vast marjority of Indiana litigants. See Strube v. Sumner, 385 N.E.2d 948 at 950, n.7 (Ind. App., 1978).

Illinois, 351 U.S. 12 (1956). In the criminal area, any financial impediment to appeal will violate the Equal Protection clause through its discriminatory effect on poor people. Griffin, supra. On the other hand the unfettered right to civil appeals has not received such blanket protection from the Supreme Court; the Supreme Court has upheld a financial impediment to a civil appeal where it was nondiscriminatorily imposed on almost all civil litigants. Ortwein v. Schwab, 410 U.S. 656 (1973). However, the Court has struck down an appeal bond requirement where it was imposed only on a specific class of litigants, leaving the majority of litigants in the state exempt, Lindsey v. Normet, 405 U.S. 56 (1972).

In Lindsey the Supreme Court considered an Oregon statute requiring tenants in possessory actions to post a bond, in addition to the normal bonds required on appeal in Oregon, in an amount twice the rental value of the premises at issue, computed from the commencement of the action to final judgment. Noting that the statute erected "a substantial barrier to appeal faced by no other civil litigant in Oregon," Lindsey, at 79, the Supreme Court sought for some rational justification for distinguishing tenant-appellants from other litigants, and found none.

Similarly in Rinaldi v. Yeager, 384 U.S. 305 (1966), the Supreme Court considered a New Jersey statute which provided that the costs of a transcript used on an unsuccessful appeal by an indigent convict confined to an institution could be recouped by the county out of the convict's wages, but made no similar provision for recoupment of costs from convicts not confined to state institutions. Finding it unnecessary to determine whether this statute impermissibly burdened an indigent's right to appeal a criminal conviction, the Court instead focused on the distinction the statute created between institutionalized and noninstitutionalized

convicts, and, finding no rational justification for the discriminatory effect on the institutionalized, the Court struck down the statute.

Thus, while a financial inhibition that burdens civil appeal rights does not, by its automatically disadvantageous effect on the poor, violate the Equal Protection clause, Ortwein, supra, the Supreme Court has held invalid statutes that single out a specific class of litigants for disadvantageous treatment on appeals. Appellent Strube contends that his case falls within the constitutional principle set forth in Lindsey and Rinaldi. The discriminatory bond in Lindsey was based on the subject matter of the case; in Rinaldi, a type of person was singled out for disadvantageous treatment; in Strube, the appellant is disadvantaged by reason of the particular court within the state judicial system in which the plaintiff chose to sue him.

It is noteworthy that Strube is disadvantaged at the whim of the plaintiff. Sumner's action against Strube could have been filed in the Marion County Municipal, Superior, or Circuit Courts, which have concurrent original jurisdiction, with the Marion County Small Claims Court over tort actions involving the amount of damages here claimed by Sumner. See IC 33-6-1-2 (jurisdiction of Marion County Municipal Courts); IC 33-5-35-6 (jurisdiction of Indiana Superior Courts); IC 33-4-4-3 (jurisdiction of Indiana Circuit Courts). If Sumner had filed this action in one of these courts, instead of in the Small Claims Court, Strube's appeal rights would then, of course, have been determined by Indiana Rule of Appellate Procedure 6(B), supra, instead of by Marion County Small Claims Rule 16(B). Thus, by choosing to file his claim in small claims court instead of in the Marion County trial court, the plaintiff obtains a significant restriction of the defendant's appeal rights.

In the opinion below, the Indiana Court of Appeals suggested several justifications for the restriction of Strube's appeal rights:

> . . .the mere fact that Marion is the most populous county in the state and logically, therefore, one of the most litigious, arguably justifies imposing an appeal bond which may tend to discourage patently insubstantial appeals.

358 N.E.2d at 952. What the Court implies but leaves unspoken is the conclusion that somehow the Marion Small Claims Court defendant-appellant is more likely to pursue frivolous appeals than his counterpart in other courts, and therefore the appeal bond rule can be justified on this basis. There is absolutely nothing in the record or in logic to suggest that the proportion of frivolous appeals is higher in Marion County than elsewhere.

The Supreme Court has dealt with the contention that an appeal bond serves a legitimate state interest by deterring frivolous appeals in both Rinaldi and Lindsey, supra. In Rinaldi the Court said:

> Apart from its fiscal objective [of reimbursing the county for the cost of a transcript], the only other purpose of this law advanced by the appellees is the deterrence of frivolous appeals. Assuming a law enacted to perform that function to be otherwise valid, the present statutory classification is no less vulnerable under the Equal Protection Clause when viewed in relation to that function. By imposing a financial obligation only upon inmates of institutions, the statute inevitably burdens many whose appeals, though unsuccessful, were not frivolous, and leaves untouched many whose appeals may have been frivolous indeed.

384 U.S. at 310. See also, Lindsey v. Normet, supra, 405 U.S. at 78.

Strube readily concedes that the deterrence of frivolous

appeals is a legitimate governmental objective. However, the appeal bond rule is too heavy-handed and overbroad a device for achieving that end. In the case sub judice, Strube vigorously maintains that he has a complete defense to the negligence action instituted against him in the Small Claims Court.[4] Yet the bond requirement has precluded him from pursuing what he contends is a totally meritorious appeal. If Marion Small Claims Rule 16(B) does prevent some frivolous appeals, it does so only because it bars all appeals by poor persons.

Rule 16(B) is, at the same time, underinclusive, in that it singles out Marion County Small Claims Court defendant-appellants for its strictures, while other litigants in the state remain undeterred from frivolous appeals.

The most definitive counter to the lower court's suggestion that Rule 16(B) is legitimized by its deterrent effect on Marion County litigants is the fact that the appeal bond rule creates more than a simple geographic disparity in rights. The discriminatory classification created by Rule 16(B) can actually be subdivided into three subclasses: (1) litigants in the Marion County Small Claims Court vis a vis litigants in all other Indiana Courts; (2) litigants in the Marion County Small Claims Court vis a vis litigants in the Marion County civil trial courts; and (3) defendant-appellants vis a vis plaintiff-appellants in the Marion County Small Claims Court. Thus Strube's attack on this rule is not based solely on lack of territorial uniformity.

---

[4]The investigating police officer's report indicates that the plaintiff contributed to the circumstances resulting in the accident through "improper driving." (Tr. 18) Contributory negligence is a complete bar to a plaintiff's recovery in Indiana. See for example Huey v. Milligan, 242 Ind. 93, 175 N.E.2d 698, 700 (1961). ("There are no degrees of negligence in Indiana, and if plaintiff. . .was guilty of any negligence, however slight, and such negligence proximately contributed to her injury, she cannot recover.")

The Indiana Court of Appeals suggests one other state interest that may be advanced by Rule 16(B):

> . . .We believe Rule 16(B) affords protection to the successful litigant and insures the recovery of his debt.

Strube, 385 N.E.2d at 952.

Strube concedes that this too is a legitimate state interest. However, for Rule 16(B) to survive Equal Protection scrutiny, it is not sufficient that it simply further a legitimate state interest. There must also be a relationship between the state interest in securing judgments and the classification created by the Rule. Rinaldi, supra. In Rinaldi, in discussing a similar proffered justification for the statute allowing recoupment of costs of appeal transcripts from institutionalized convicts, the court stated:

> We may assume that a legislature could validly provide for replenishing a county treasurey from the pockets of those who have directly benefited from county expenditures. To fasten a financial burden only upon those unsuccessful appellants who are confined in state institutions, however, is to make an invidious discrimination.

Rinaldi, 384 U.S. at 309.

While it is legitimate for the state to promulgate laws or rules securing the judgments of plaintiffs, there is no reason to subject only Marion County Small Claims defendant-appellants, and no other litigants in the state, to the beneficent effects of such a rule.

An additional flaw in the argument that Rule 16(B) serves the legitimate state interest of securing judgments rests on the fact that in many cases, including the instant case, the appeal bond requirement does not improve the judgment creditor's chance of collecting his judgment, nor would the absence of the rule diminish the chance of collection. An appeal without bond in Indiana will not stay enforcement of the judgment. Hayes Freight Lines, Inc. v. Oestericher, 117 Ind. App. 143,

68 N.E.2d 792 (1946). In the absence of a bond requirement, Sumner is still free to pursue his remedies supplemental during the pendency of this appeal. In light of Strube's inability to post a bond, Rule 16(B) does not improve Sumner's chances for collecting his judgment. The Rule's only effect in the instant case is to bar Strube from perfecting an appeal.

In a case somewhat similar to the instant case, Caulk v. Nichols, 281 A.2d 24 (Del., 1971), App. dis., 408 U.S. 901 (1971), the Delaware Supreme Court upheld a statute which required justice of the peace defendants to post a bond in order to appeal, against plaintiff's contention that the statute arbitrarily discriminated against him vis a vis superior court litigants, justice of the peace plaintiffs, and non-indigent justice of the peace defendants.

In that case, the Delaware Court suggested several possible justifications for the distinctions created by the Delaware statute. The similarity of the Caulk case to the instant case compells appellant to address the justifications there advanced.

The court in Caulk suggests that the differential treatment accorded superior court and justice of the peace court appellants may be justified by the fact that on appeal the justice of the peace appellant receives a trial de novo.

> Thus, a loser before a Justice of the Peace has an advantage over his counterpart in a Superior Court case, in that he has two chances to obtain a favorable decision on the evidence.

Caulk, at 27.

Strube would contend that the advantage which the Delaware Court sees in a trial de novo is illusory where the defendant is precluded from any appeal by his inability to meet a bond requirement.

The Delaware Court also states that it fails to see how the appeal bond rule discriminates against defendants vis a vis

plaintiffs. Contrary to the court's assertion, the discrimination claimed is obvious -- defendants must overcome a financial barrier in order to appeal; plaintiffs need not.

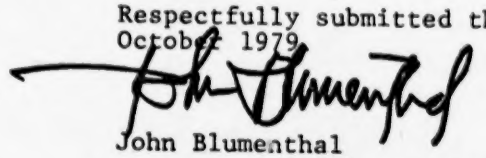
In any event, the Caulk case is distinguishable from the instant case in that the justice of the peace system examined there was statewide, and not confined to a single county. To a much greater extent than in Caulk, Strube is singled out and disadvantaged relative to the mainstream of the state's judicial process.

Strube contends that under any level of equal protection scrutiny, no government interest can be put forward which can relate to the classifications created by Marion County Small Claims Rule 16(B). For this reason, the rule should be stricken as an infringement of Strube's rights under the Equal Protection clause of the Fourteenth Amendment to the United States Constitution.

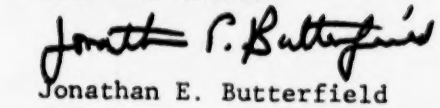
CONCLUSION

For these reasons, this Court should note probable jurisdiction of this appeal.

Respectfully submitted this 22nd day of October 1979.



John Blumenthal



Jonathan E. Butterfield

Donald Driscoll

Susquehanna Legal Services
416 Pine Street
Williamsport, PA 17701
(717) 323-8741

Bruce Hugon
Legal Services Organization of Indiana
107 North Pennsylvania Street, #300
Indianapolis, IN

ATTORNEYS FOR APPELLANT